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Ebba E. Finlayson v. Kenneth Brady and Donald B. Milne : Brief of Appellant

Utah Supreme Court

F. Robert Bayle; Attorney for Plaintiffs and Appellants;

7713

In the Supreme Court of the State of Utah

EBBA E. FINLAYSON and ALLAN FINLAYSON,
Plaintiffs and Appellants,

vs.

KENNETH BRADY and DONALD B. MILNE, partners doing business as Brady-Milne Appliance Company,
Defendants and Respondents.

No. 7713

BRIEF OF APPELLANT

F. ROBERT BAYLE,
Attorney for Plaintiffs and Appellants

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BRIEF OF APPELLANT

NATURE OF CASE

This suit was brought by the appellants, Ebba E. Finlayson and Allan Finlayson, husband and wife, against the respondents, Kenneth Brady and Donald B. Milne, partners doing business as Brady-Milne Appliance Company, to recover the purchase price of four gas space heaters purchased by the appellants from the respondents, for breach of warranty, and for additional damages for loss of rentals during October, November and December, 1949, in the apartment house of the appellants

where the heaters were installed. The respondents filed an answer and counterclaim for the balance claimed to be due and owing on the purchase price of the heaters but prior to doing so, brought a separate suit (R. 52-61) upon the same theory and for restoration of the porperty under a Writ of Replevin (R. 65). The appellants in turn filed their answer and counterclaim (R. 76-80) and at the pre-trial hearing, the court ordered the two cases consolidated for trial (R. 22-25).

STATEMENT OF FACTS

In the summer of 1948, the appellants were in the process of constructing an apartment building situated at 466 Lindell Lane in Sandy City, Utah (R. 115a). The building was a fourplex, consisting of three four-room apartments and one three-room apartment (R. 115a). Each apartment was designed to be heated with a separate gas space heater (R. 116). Apartment No. 1 was located on the ground floor, west side of the building, apartment No. 2 on the ground floor east, apartment No. 3 in the basement under No. 2, and apartment No. 4 was likewise in the basement, under No. 1 (R. 144-145). Two separate flue chimneys were constructed in the building, one on the East side to provide vents for apartments 2 and 3, and the other on the West side to vent the heating units in apartments 1 and 4 (R. 121, 122, and 123).

One of the appellants, Mr. Finlayson, had known the respondents for many years and first talked with one of them, Mr. Milne, during the summer of 1948, and several times thereafter, regarding the purchase of the gas space heaters which

is the subject matter of the controversy herein involved (R. 117, 152 and 153). At that time a gas application had been made to the gas company and Finlayson was in the process of securing a right of way for the installation of the gas line to his apartment building (R. 117 and 119). Mr. Milne took the appellants and their son to his place of business at Murray, Utah, and showed them the heaters they were selling. Mr. Finlayson recalls that these heaters were a Crosley brand, but there is a conflict in the testimony on this point (R. 118, 119 and 202). About December 6, 1948, a written contract was signed by Mrs. Finlayson, and Mr. Milne on behalf of the appliance company. It was not dated as the gas was not yet available in the Finlayson apartment building (R. 118, 119 and 120—Plaintiff's Exhibit A). This contract covered the purchase of four refrigerators, four cooking ranges, one washing machine, one water heater, and the four gas space heaters. The sum of $340.00 was paid in cash and that amount indicated as the down payment (R. 121—Plaintiff's Exhibit A). Some three weeks later, another contract was signed by Mrs. Finlayson, and the appliance company, this time by Kenneth Brady (Plaintiff's Exhibit B). The evidence is in conflict as to whether this second contract was dated when signed. Mr. Finlayson testified that it wasn't to be dated until the gas was put in the premises and they were ready for occupancy (R. 121). The same cash down payment was reflected in the second contract, with a time balance of $1475.65 (Plaintiffs' Exhibit B). Thereafter, the appellants made two payments, one for $150.00 on January 17, 1949, and one on March 3, 1949, for $140.00 (Plaintiffs' Exhibits C and D). Additional payments in the total sum of $983.50 were thereafter made on the con-

tract which had been assigned to the Sandy City Bank (R. 125, 126 and 127), leaving a balance on the contract of $202.15 (R. 143).

The respondents, as the sellers of the gas heaters, agreed to install the same, one in each apartment, as part of their contract (R. 121, 122, 123, 124, 125, 126, 127, 156, 157, 260, 261 and 289). This was done prior to the time the apartment building was completed and the first time there was occasion to use the heaters was in September, 1949 (R. 128). The heaters leaked gas and all of the tenants moved because it was impossible to have the heaters in operation due to their defective condition (R. 128 and 129). In response to complaints by Mr. Finlayson, the respondents removed the heaters in November, 1949, and had the collars inside of them welded to alleviate the escaping gas (R. 129, 130, 250, 309 and 310—Plaintiffs' Exhibit E). As a result of this unsatisfactory situation, the appellants lost rentals in their apartment building as follows: apartment No. 1, $130.00; apartment No. 2, $130.00; apartment No. 3, $70.00; and apartment No. 4, $195.00. These losses, in the aggregate of $525.00, were for the months of October, November and December, 1949 (R. 130, 131, 132, 158, 159, 160, 161 and 162). No claim is made for losses occurring after December 31, 1949, as the apartment building was sold on contract to Edwin H. Anderson and Emma Anderson effective January 1, 1950 (R. 164 and 302). However, title was not to pass from the appellants until payment of the contract in full, at which time a deed was to be given.

After the collars on the heaters had been welded, they

still continued to spill gas into the apartments and the gas company made numerous calls to the premises in an effort to correct the situation. One tenant testified that she called the gas company about fifteen times and that she experienced severe headaches (R. 178, 179, 180 and 181). The other three tenants likewise experienced trouble with these heaters and finally in the latter part of October, 1950, the gas company condemned them and capped off the gas supply, so the tenants were without heat (R. 180, 181, 186, 187, 188, 189, 190 and 192). It was then determined that the diverters inside the heaters were so designed that they permitted spillage of the burned products of combustion back into the room rather than diverting the fumes into the vent (R. 192, 193, 194, 198, 199, 280 and 281). The gas company recommended that the baffles on the diverters in each heater be modified to eliminate the spillage of gas fumes (R. 192, 193, 194, and 195—Plaintiffs' Exhibit G). Mr. Finlayson called the Sandy Bank and informed them that no further payments would be made on the contract unless the heaters were replaced (R. 135, 136, 142 and 143). The heaters were again removed from the premises, taken to the gas company's laboratory, and the diverters changed as recommended (R. 213, 214, 215 and 281). After the heaters were returned to the apartments, it was apparent that the two upstairs ones were still spilling fumes, so the flue vents were raised by the respondents (R. 283 and 291). In January, 1951, the heater in apartment No. 4 exploded (R. 174, 175 and 176). This was apparently from the malfunctioning of the orifice in the heater causing it to clog, due to excessive corrosion (R. 177, 200 and 201—Defendants' Exhibit 10).

At the conclusion of the trial the court directed a verdict of no cause of action on the plaintiffs' complaint and further directed that judgment be entered in the sum of $491.75 in favor of the defendants and respondents, and for costs and attorney's fees.

STATEMENT OF POINTS

The plaintiffs filed this appeal, and have designated and included the entire record and all the proceedings and evidence in the action, and in their appeal rely upon the following points:

1. That the court below erred in directing a verdict in favor of the defendants and against the plaintiffs.

2. That the court below erred in awarding attorney's fees to the defendants where there was no breach of contract by the plaintiffs.

3. That the court below erred in denying plaintiffs' motion for a new trial.

ARGUMENT

POINT I

The trial court concluded that the plaintiffs had failed in their burden of proof to show by a preponderance of the evidence that there existed any breach of warranty insofar as the heaters were concerned. It is difficult to follow the trial

court's conclusion in this respect particularly in the light of the comments made at the conclusion of the trial wherein the court said (R. 328):

> "Second, under the contract of purchase was the defendant Brady-Milne Appliance Company to make installation of the equipment described in the complaint?
>
> *Well, there isn't any question they were to make that installation, and they did make that installation.*
>
> "The third question, was the installation of the said equipment properly made so as to avoid gas leaks; I don't think there is any question that there was a gas leak in there; *no question in my mind but what the installation there wasn't proper.*"
>
> "Fourth, was the property described in plaintiff's complaint reasonably fit for the purposes and uses for which it was intended? *I don't think it was. I think they had to take it out and do some work on it before it would work.*"

In view of the foregoing comments, it was overwhelmingly apparent from the evidence that there had been a breach of contract on the part of the defendants both as to the installation of the heaters and the implied warranty as to their fitness for the particular purpose for which they were required. We submit that the case should have been submitted to the jury under proper instructions from the court and that they as triers of the facts, were entitled to determine the rights of the plaintiffs in the light of all of the evidence. We contend that the jury could have found that there was certainly a breach of contract on the part of the defendants for the reasons above

stated, and that by such breach of contract, the defendants could not recover the purchase price of the heaters.

Under our system of jury trials it is the province of the jury and not the court to determine all questions of fact and to pass upon the credibility of the witnesses as they appear before them and testify. The court determines and decides questions of law and directs its application to the facts, but the jury is to determine the disputed facts of the case from the evidence adduced, in accordance with the instructions given by the court. 53 American Jurisprudence, Para. 293, page 248.

Likewise, a cause should never be withdrawn from the jury unless it appears, as a matter of law, that a recovery cannot be had upon any view of the facts which the evidence reasonably tends to establish. If there is conflicting evidence, and any view that the jury might lawfully take of it will sustain their findings for either party, the facts should not be withdrawn from them. 53 American Jurisprudence, Para. 299, page 251.

Applying these principles to the instant case and viewing the evidence in the light most favorable to the plaintiffs, we respectfully submit that the plaintiffs sustained their burden of proof in making a prima facie case and that the trial court erred in directing a verdict in favor of the defendants.

Passing now to the question of warranties in the law of Sales as applied to the heaters sold by the defendants to the plaintiffs, this court has recently considered such a proposition in the case of Carver vs. Denn, 214 Pac. 2d 118, decided January 31, 1950. In that case the plaintiff brought suit for the purchase price of air conditioning equipment installed in the defendant's place of business; the defendant pleaded a breach

of warranty as to fitness in defense. This court in sustaining the trial court's judgment in favor of the defendant said:

> "It is apparent from the facts in this case that the respondent was primarily interested in air-conditioning his place of business, rather than in purchasing any specific chattel. The plaintiff was aware that defendant knew nothing about air-cooling equipment and he was also aware of the fact that the principal object of the negotiations and subsequent sale was to provide a suitable cooling system for defendant's jewelry store . . . The implied warranty of fitness for the particular purpose is not negatived by the seller's use of a brand name when it is used merely for convenience in identifying the equipment to be installed."

The court's attention is respectfully invited to Hales-Mullaly, Inc. vs. Cannon (Okla. 1941) 119 Pac. 2d 46. In this case plaintiff filed suit in replevin for recovery of an office air conditioner sold to defendant, who was a doctor. The defendant counterclaimed setting up a breach of an implied warranty and demanded damages for loss of time, fees and patients due to plaintiff's mechanics working on the units in defendant's office. The jury awarded a verdict in favor of the defendant and plaintiff appealed. The court held that the evidence as to the breach of the implied warranty was sufficient to submit to the jury the question as to whether the machine was unfit for the purpose for which defendant purchased it, and said:

> "It was incumbent upon plaintiff, by whom the machine was installed, and to whom the place where and the purpose for which defendant bought it were

known, to ascertain, before installing the machine, whether it would properly operate upon the electrical voltage furnished in such building. *This plaintiff did not do.* Defendant purchased the machine upon reliance upon plaintiff's assurance that it would work properly in his office, and keep at least one room cool. Therefore the implied warranty was for the particular purpose. It is clear that the machine failed to properly function."

Battle Creek Bread Wrapping Machine Co. vs. Paramount Baking Co., 88 Utah 67, 39 Pac. 2nd 323.

Even the fact that an article has a trade-name does not negative an implied warranty of fitness for a particular purpose where it is purchased not necessarily by the name, but for a paritcular purpose and supplied for that purpose. 55 C. J. 757.

Jones vs. Just, 23 English Ruling Cases 466: "Where the manufacturer or dealer contracts to sell an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied term of warranty that the article will be reasonably fit for the purpose to which it was to be applied."

Iron Fireman Coal Stoker Co. vs. Brown, 182 Minn. 399, 234 N. W. 685.

Pierce vs. Crowl, 190 P. 2nd 1003.

We believe the instant case comes squarely within the provisions of sub-section (1) of Section 81-1-15 Utah Code Annotated, 1943, which provides:

"Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which

the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he is the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose."

This court in commenting upon this statute in the Carver vs. Denn case, supra, said:

> "The statute throws a partial cloak of protection around a buyer who purchases an article for a particular purpose when he must rely on the skill or judgment of a seller to determine if the article will serve the purpose."
>
> Greenland Development Corporation vs. Allied Heating Products Company, Inc., 164 A. L. R. 1312.

In the case at bar the defendants undertook to sell to the plaintiffs heaters which would be suitable for heating the apartments in which they were installed by the defendants. The defendants had been in the appliance business for some six years (R. 237 and 305). They had sold merchandise to the plaintiffs on previous occasions (R. 238). They inspected the premises in which the heaters were to be installed and undertook the installation (R. 239, 240, 256, 257 and 258). The heaters were to be connected to the main chimneys (R. 258). The plaintiffs relied upon the defendants to furnish heaters suitable for the heating of the respective apartments. The evidence plainly shows that the heaters were defective from the beginning. The defendants endeavored to correct the deficiencies by changing the design and also by welding the collars inside the heaters. It is apparent that the plaintiffs did not receive what they bargained for in the purchase

of the equipment and that they were entitled to an offset on the contract for the purchase price of the heaters in the sum of $336.00 (R. 142 and 143). The jury was also entitled to consider evidence of the loss of rentals claimed directly as a result of the malfunctioning of the heaters (R. 130, 131 and 132), as these additional damages flowed naturally from the breach of warranty on the part of the defendants.

POINT II

It is the contention of the plaintiffs that the trial court erred in awarding attorney's fee in the sum of $200.00 to the defendants where there was no breach of contract by the plaintiffs. The basis for such an allowance is contained in the last sentence of paragraph 5 of the contract (Plaintiffs' Exhibits A and B) wherein it is provided:

> "Purchaser agrees to pay all costs of collecting any amount or enforcing any rights hereunder including any expenses incurred, reasonable attorney's fees and the cost of the time and services of any employees in making collection."

This court's attention is again respectfully invited to the comments made by the trial court at the conclusion of the trial wherein the court said (R. 328):

> "Did the plaintiffs breach the contract of purchase by failing to pay the amounts required to be paid by the contract? Well, I don't think enough so to let this thing go just on that point. I think there was some reason for his not paying, that this matter wasn't work-

ing right, and he had a right to get it working properly before he paid his money."

It must be remembered that the plaintiffs initiated action against the defendants after they had exhausted all patience with the manner in which the heaters had functioned. Then for some unknown reason the defendants not alone filed an answer and counterclaim to the plaintiffs' complaint, but filed another distinct and separate suit themselves as party plaintiffs. From the foregoing comments of the trial court, it is obvious that the record was devoid of any evidence which would justify even the jury finding that the plaintiffs had in any way caused a breach of contract by their mere refusal to continue making payments when the heaters purchased were so obviously defective. However, at best it was a question of fact that should have been submitted to the jury under proper instructions from the trial court. At the risk of appearing repetitious, we invite the court's attention to the testimony of Owen Despain, assistant cashier of the Sandy City Bank, who appeared for the plaintiffs (R. 225 to 237). He asserted that the only periods during which the plaintiffs were delinquent in their payments under the contract were when they had been granted a deferment in the Spring of 1949 (R. 226) or when they refused to pay by reason of their dissatisfaction with the equipment that had been delivered, and the manner of installation (R. 227, 234 and 235—Plaintiffs' Exhibits E and F). This the plaintiffs had a right to do in view of the defective heaters and the efforts on their part to exert the defendants to exchange them for ones that would be reasonably suitable for the heating of the apartments, the purpose for which they were purchased.

In the light of the evidence, we respectfully conclude that the trial court was in error in entering judgment on the contract and in awarding attorney's fees to the defendants.

POINT III

Even though this was a trial by jury, the trial court signed and filed Findings of Fact and Conclusions of Law, and Judgment, the same having been submitted by defendants' counsel (R. 41 and 45). The plaintiffs' motion for a new trial came on for hearing and at that time objection was made by plaintiffs' counsel to the Findings and Judgment which had been filed. The trial court ordered the same withdrawn and directed that a Judgment on Verdict be substituted (R. 49). The Verdict and Judgment on Verdict were then prepared and signed, nunc pro tunc, the clerk of the court merely signing the jury foreman's name as follows: "Meldo F. Dixon, Foreman, by Richard C. Diblee" (R. 46 and 47.) This we believe to be an abuse of the court's discretionary power as certainly there was no statutory right to direct that the jury foreman's name be signed by other than the jury foreman himself.

We believe this situation to be governed by the provisions of Title 104-30-8, Utah Code Annotated, 1943, which provides:

> "When trial by jury has been had judgment must be entered by the clerk in conformity to the verdict, within twenty-four hours after the rendition of the verdict, unless the court orders the cause to be reserved for argument or further consideration, or grants a stay of proceedings. Other judgments must be entered im-

> mediately after the order therefor or the filing of the decision of the court."

In the instant case, the statute above quoted required that the verdict be signed by the jury foreman and the court was afforded no discretionary power to order the judgment entered. The statute required that the clerk enter the judgment in conformity with the verdict and as this procedure was not followed, the judgment was a nullity.

As was said by this court in the case of Ellinwood vs. Bennion, 73 Utah 563, 276 Pac. 159:

> "When trial is had by jury, the judge or court does not render or sign a judgment, but judgment must be entered by the clerk in conformity to the verdict."

Accordingly, it is respectfully urged that the judgment so entered was void and a new trial should have been granted on this point alone.

CONCLUSION

We respectfully submit that each of the points of error is well taken and should be sustained, that the decision of the trial court was erroneous and should be reversed, and judgment entered for the plaintiffs upon their complaint.

Respectfully submitted,

F. ROBERT BAYLE,
Attorney for Plaintiffs and Appellants